

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DILLON MCGARVEY
Claimant

VS.

FOOTLOCKER RETAIL, INC.
Respondent

AND

AMERICAN CASUALTY CO. OF READING PA
Insurance Carrier

Docket No. 1,035,541

ORDER

Respondent and its insurance carrier (respondent) request review of the January 24, 2008 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) found that the respondent received notice on July 11 and given the statutory method of calculating time, the notice was given in a timely manner. Therefore the ALJ denied respondent's request to terminate benefits.

The respondent argued that the claimant failed to give notice as required by K.S.A. 44-520 and as such, its request to terminate benefits should have been granted. Accordingly, respondent asks the Board to reverse the ALJ's Order and deny any further benefits. Conversely, claimant contends that the ALJ's Order denying respondent's request to terminate benefits should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

This is the second time this claim has appeared before the Board. Rather than restate the facts, the factual recitation from the earlier Order is hereby incorporated herein and will only be summarily referred to with the additional evidence being set forth in detail.

At its first appearance, two issues were in dispute. First, whether claimant sustained an accidental injury arising out of and in the course of his employment with respondent on June 27, 2007. The second issue is whether claimant provided timely notice of that accidental injury. Only claimant testified at this first preliminary hearing and he asserted that on June 27, 2007 he told his supervisor, Don Wilson, of his accident. Mr. Wilson did not testify. The ALJ concluded that claimant had met his evidentiary burden on both counts and granted benefits. This member of the Board affirmed the ALJ's conclusion that claimant had provided timely notice of his claim and the ALJ's preliminary hearing Order was affirmed. In making this determination, this member made the following observation:

Unless and until Mr. Wilson testifies, or claimant's credibility is so significantly eroded that his testimony is unreliable, then the ALJ acted appropriately in finding that the statutory notice was provided in a timely manner.¹

Thereafter, respondent made the necessary demand upon claimant and sought a termination of benefits based upon a lack of notice. When claimant would not concede the change, a preliminary hearing was held. At this second hearing, not only did Mr. Wilson testify, but so did Kyle Lang, the security director, and Tasha Rafferty, the human resources director. Each of these individuals confirmed that claimant was terminated on June 27, 2007, but that he did not ever mention a work-related injury occurring on that date or in the subsequent meeting that was held between the claimant, his wife and Tasha Rafferty. Ms. Rafferty admitted that her first notice of a work-related injury came, on July 11, 2007, when claimant's lawyer sent a letter to respondent. This letter itself does not set forth the details of the injury, but, it references an enclosed written claim. That written claim is, more than likely, the E-1 which was filed with the Division on July 11, 2007 and retained within the Division's file. It sets out in detail the date and mechanism of claimant's injury.

Following the second preliminary hearing, the ALJ refused to terminate benefits, reasoning that:

Respondent[s] counsel conceded in the previous hearing that notice was received by July 11. As July 11 is the 9th day following June 27, the intervening weekends and the July 4 holiday being excluded from the computation, notice was timely.²

Thus, respondent's request to terminate benefits was denied.

¹ Board Order, 2007 WL 334853 at 4 (Oct. 31. 2007).

² ALJ Order (Jan. 8, 2008).

That denial is now before the Board and after reviewing the entire contents of the record, this Board Member finds the Order should be affirmed.

The only issue at the second preliminary hearing was timely notice. No other issues were properly brought before the ALJ.³ As noted before notice of an accident must be given within 10 days, or if there is just cause for a delay, within 75 days. Here, the ALJ found that claimant gave notice on July 11 based upon respondent's admission that it received a letter from claimant's counsel. Respondent maintains that letter lacks the specificity required by the statute and this Board Member agrees. That letter, standing alone, does not reflect an accident date, nor any other specifics. However, that same letter contained an enclosure which does satisfy the criteria. The E-1 sets forth the date of the accident, the mechanism of injury and body parts involved in the accident. Like the ALJ, this member of the Board finds that claimant provided timely notice of his June 27, 2007 accident. The ALJ's preliminary hearing Order dated January 24, 2008 is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁴ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated January 24, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

³ Respondent had also sought to modify the rate of temporary total disability benefits based upon new wage information. But that issue was not contained within the statutorily required 7 day notice and the ALJ refused to hear that issue. And that issue was not brought before the Board in the parties' briefs.

⁴ K.S.A. 44-534a.